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IN THE

Supreme Court of the United States

OCTOBER TERM 1975
NO. 74-532

CHESTER MCKINNEY,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON WRIT OF CERTIOARI
TO THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

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OPINION BELOW

The Opinion of the Supreme Court of Alabama is reported at 292 Ala. 484, 296 So.2d 228 (1974).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 9, 1974. On September 4, 1974, Mr. Justice

Powell granted an extension of time within which to file a Petition for Writ of Certiorari to November 3, 1974. The Petition was filed on November 4, 1974 (November 3 falling on a Sunday) and was granted on June 23, 1975. This Court's jurisdiction is invoked under *Title 28 United States Code §1257(3).*

QUESTIONS PRESENTED

1. Whether the provisions of Title 14, Section 374, Code of Alabama, deprived the Petitioner of rights guaranteed him under the *First, Fifth, Sixth,* and *Fourteenth Amendments* to the *United States Constitution* by allowing his conviction while denying him the right to litigate a material element of the offense and by binding him to a prior determination of that opportunity to be heard.

2. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, under a standard for judging *scienter* solely by alleged proof of a general knowledge of the nature and character of the materials involved, and without competent evidence to establish even that Petitioner had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioner of his liberty and property without due process of law, in violation of the *First, Fifth,* and *Fourteenth Amendments.*

3. Whether the provisions of Title 14, Section 374, Code of Alabama, on its face and as construed and applied to authorize the judgments of conviction of Petitioner herein, were, prior to June 21, 1973, unconstitutionally vague, violating the *First, Fifth,* and *Fourteenth Amendments,* because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California,* 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the average person in the nation as a whole, which test this Court labelled "unrealistic;"

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous."

4. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the indictment, trial and convictions of Petitioner were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts,* 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed

national community standards and had educational and other social value, violate the free speech and press and due process provisions of the *First, Fifth,* and *Fourteenth Amendments.*

5. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications named in the indictment are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the *First, Fifth,* and *Fourteenth Amendments.*

6. Whether the provisions of Title 14, Section 374, Code of Alabama, on their face and as construed and applied to authorize the judgments of conviction of Petitioner herein, where the publications, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs* and *Miller* tests by the Supreme Court abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioner of his liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen construction of the provisions of the statute, all in violation of the guarantees of the *First, Fifth,* and *Fourteenth Amendments* and *Article I,* §9.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 14, Section 374, Code of Alabama are:

"(a) Section 374(3):

" 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying

contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"(b) Section 374(4):

"Importation, sale or possession of obscene printed or written matter; penalties –
"[1] Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, on in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.
"[2] Every person who, with knowedge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court."

STATEMENT

On March 21, 1970, Petitioner was charged, pursuant to Title 14, Section 374, Code of Alabama, with selling a magazine entitled "New Directions" which had been judicially declared obscene. The magazine was one of several declared to be obscene in a decree rendered by the Circuit Court of Mobile County, Alabama, on February 26, 1970. The Petitioner was not a party to the Mobile County Circuit Court proceedings in which the magazine was declared to be obscene. He had neither notice thereof nor an opportunity to be heard therein.

At Petitioner's trial the State introduced evidence as to the sale of the magazine by Petitioner and, over Defense objections, the outcome of the Mobile County Circuit Court proceedings in which the magazine was found obscene. The trial court instructed the jury that the only issue of fact for their determination was whether or not the Petitioner had sold a magazine judicially declared to be obscene in an action to which he was not a party. The jury found the Petitioner guilty and he was sentenced to a fine of $2,000 and incarceration for a period of one year.

The Alabama Court of Criminal Appeals affirmed Petitioner's conviction without opinion and denied an application for rehearing. The Supreme Court of Alabama, upon a Writ of Certiorari, affirmed the conviction.

SUMMARY OF ARGUMENT

The statute involved herein denies basic due process guarantees by incorporating in a criminal prosecution the results of a prior judicial determination on one of the material

elements of the offense charged. This procedure deprives defendants of the right to litigate that material element of the offense charged, binding them to results from proceedings in which they may not have been involved. The procedure is further defective by failing to require proof of *scienter* to the constitutional minimums established by this Court in *Hamling v. United States*, 418 U.S. 87 (1974).

ARGUMENT

I.

The informities of Title 14, Section 374(4), Code of Alabama, and of the Petitioner's conviction thereunder were clearly pointed out in Chief Justice Heflin's dissent in the Alabama Supreme Court. He stated that:

> "The state has attempted to circumvent the usual criminal process by using a civil judgment as conclusive proof of one essential element of the criminal act . . .
>
> "In the case at bar, the statute operated to deny the defendant his right to a jury trial on the most essential element for which he may be condemned – i.e., the obscenity of the matter sold – and he was denied his right to the protection of the criminal burden of proof. In re Winship, 397 U.S. 358 (1970) ('The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt . . . ')."

In a recent *per curiam* opinion this Court held that a conviction for willfully contributing to the delinquency of a minor, violated due process because there was no evidence at trial that

the defendant sold the item in question, that he knew it had been sold to a minor, that he authorized such sales to minors, or that he was in the store at the time of the sale. *Vachon v. New Hampshire*, 414 U.S. 478 (1974). This Court held that:

> "This fatal void in the State's case was not filled by appellant's concession at trial that he controlled the premises on July 26. That concession was evidenced at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her.
>
> "In these circumstances, the conviction must be reversed. It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process. Harris v. United States, 404 U.S. 1232, 1233, 30 L.Ed.2d 25, 92 S.Ct. 10 (1971). (Chambers opinion of Douglas J.); Thompson v. Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624, 80 ALR2d 1355 (1960); Johnson v. Florida, 391 U.S. 596, 20 L.Ed.2d 838, 88 S.Ct. 1713 (1968); see also Adderley v. Florida, 385 U.S. 39, 44, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966)." 414 U.S., at 480.

It is admitted by the State that Petitioner was not a party to the civil proceeding in which the publication which Petitioner was charged with selling was found obscene. Since the decree was conclusive in Petitioner's trial on the issue of obscenity and Petitioner was not allowed to cross-examine the witnesses, if any, proving the magazine was obscene, or the Judge in that action, Petitioner was also denied his right to confront the witnesses against him on that issue. *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965).

This Court recently reaffirmed the right of confrontation in *Davis v. Alaska*, 415 U.S. 308 (1974). Mr. Chief Justice Burger wrote that:

> "We do conclude that the jurors were entitled to have the benefit of the defense before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' Douglas v. Alabama, supra, 380 U.S. at 419, 13 L.Ed.2d 934. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner.
>
> * * *
>
> Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1,3 [16 L.Ed.2d 314, 86 S.Ct. 1245]." Smith v. Illinois, 390 U.S. 129, 131, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968)." 415 U.S., at 317-318.

The procedure authorized by Title 14, Section 374, Code of Alabama, by dispensing with the necessity of proving a material element of the offense, by denying criminal defendants the right to litigate that material element, and by binding such defendants to the results of prior proceedings in which they may not have participated, violates the most basic rudiments of due process. By binding defendants to the results of prior proceedings without assuring that they had notice of such proceedings and an opportunity to participate therein, the procedure violates even those fundamentals of due process held necessary in the civil context. *Mullane v. Central Hanover Bank*,

339 U.S. 306 (1950); *Goss v. Lopez*, 419 U.S. 565 (1975). Petitioner's conviction is thus constitutionally infirm and cannot stand.

II.

Title 14, Section 374, Code of Alabama and the Complaints filed against the Petitioner do not clarify what meaning is attributed to the word "knowingly", nor was "guilty knowledge" proved at the trial. The statute and the Complaints were required to set forth precisely the degree of "guilty knowledge" that a Defendant is required to defend against. Moreover, as we demonstrate hereinafter, actual "guilty knowledge" of the nature, contents, and character of the material is constitutionally required. See *Hamling v. United States*, 418 U.S. 87 (1974).

In *Smith v. California*, 361 U.S. 147 (1959), this Court held that the strict liability feature of the California obscenity law was unconstitutional. The tendency of the California ordinance, the Supreme Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. 160.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute

criminal liability which was condemned by the Court in *Smith v. California*, supra. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex does not meet the tri-partite knowledge requirements of *Hamling*, supra. Mere proof that a publisher, landlord, or distributor knows that he distributes "Tropic of Cancer", "Lady Chatterley's Lover", "Fanny Hill", "Pleasure is My Business", "Lust Pool", "Shame Agent", "Sin Hooked", "Lust Job", "Sex Life of a Cop", "Solis", etc. in no way establishes, it is submitted, that such publisher or distributor knows the nature, character and contents of those publications. The decision of this Court make this abundantly clear. It is likewise clear that the statute in question herein permits such a strict liability. The problem is further compounded by the statute's and the court's total preclusion of the Petitioner from defending on the issue of obscenity *vel non* at mistrial.

Mr. Justice Rehnquist has defined the requisite criminal knowledge for obscenity convictions: "It is constitutionally sufficient that the prosecution show that a defendant *had knowledge* of the contents of the materials he distributes, *and* that he *knew* the character *and* nature of the materials." *Hamling v. United States*, 418 U.S., at 123 (1974) (emphasis supplied). Even though knowledge of a material's legally obscene status is not required, and thus traditional *scienter* is not required for the class of speech crimes *qua* obscenity crimes (see *Hamling* and *Smith* supra), *actual* knowledge of the contents, nature, and character of the material *is* required for conviction. From *Roth v. United*

States, 354 U.S. 476 (1957), through *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), to *Miller v. California,* 413 U.S. 15 (1973), this Court has been attempting to define what is "obscene" and whether or not the obscenity laws, state or federal, give an accused adequate notice of what is proscribed. If nothing else, seventeen (17) years of constitutional adjudication have indicated that the laws of this country, and its courts, have been somewhat confused. If actual knowledge of the contents, nature, and character of materials is required for a conviction of the substantive offense, then at least that actual knowledge must be *found* before one can be found guilty of violating the law. Thus, the mere showing of a "managership," possession or sale without proof of actual knowledge of the nature, character, and contents of materials is insufficient as a matter of constitutional law to uphold the convictions herein.

First Amendment rights have the highest standards of protection in the American system of jurisprudence, and those rights may only be disturbed when there exists a demanding, overriding, and compelling state interest, and even then such incursions are to be severely limited. *Dombroski v. Pfister,* 380 U.S. 479; *Keyishian v. Board of Regents of New York,* 385 U.S. 589; *Dejone v. Oregon,* 299 U.S. 353. If speech is to be regulated at all, such regulation is to be narrowly drawn so as not to impinge on rights that are properly beyond the sphere of that narrowly conceived area of governmental reguilatin. *NAACP v. Button,* 371 U.S. 415; *Shelton v. Tucker,* 364 U.S. 479. Where statutes on their face or as applied are vague and overbroad, then the chilling effect *Dombroski* warns of rears its ugly head.

There is a lack of Due Process of Law and fundamental fairness when persons cannot be adequately forewarned that

their presumptively lawful activities might someday be used against them in a criminal prosecution. People tend to steer far away from activity that might later be termed "dealing in obscenity" and the chilling effect on protected activity becomes clear. *Speiser v. Randall,* 357 U.S. 513; *NAACP v. Button,* 371 U.S. 415.

In order to avoid self-censorship and a chilling effect on *First Amendment* freedoms, see *Smith v. California,* 361 U.S. 147; *Dombroşki v. Pfister,* 380 U.S. 479, then it is necessary that convictions be based on a *knowing* violation of the law, i.e., a *knowing* sale, distribution or possession with intent to disseminate of *obscene* material *with knowledge* of its contents, nature, and character. See *Hamling,* supra.

Statutes may regulate speech only with narrow specificity or else cherished *First Amendment* freedoms will suffer. Real or vague threats of prosecutions, whether they turn out to be successful or not, clearly deter people from the free exercise of those rights. "So long as the statute remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombroski,* supra, at 494. See, *NAACP v. Button,* 371 U.S. 415; *Keyishian v. Board of Regents of New York,* 385 U.S. 389; *Speiser v. Randall,* 357 U.S. 513; *Shelton v. Tucker,* 364 U.S. 479; *DeJonge v. Oregon,* 299 U.S. 353; *United States v. Baranski,* 484 F.2d 556 (CA-7 1973); *United States v. Dellinger,* 472 F.2d 340 (CA-7 1972); *United States v. Spock,* 416 F.2d 165 (CA-1 1969):

> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute

> contained within constitutional limits only by authoritative constructions sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in Baggett v. Bullit, supra, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of the statutory standard. We believe that those affected by the burdens of defending prosecutions, however expenditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

Dombroksi, supra, at 490-491.

The obscenity statute here involved, Title 14, Section 374, Code of Alabama, purports to punish the knowing possession, sale or distribution of obscene materials. It does not purport to punish the possession, sale or distribution of books or writings dealing with sex. *Scienter* means guilty knowledge. This means that the prosecution in any obscenity case must charge and prove that the Accused *knew* the contents, nature, and character of the material (see *Hamling*, supra), not merely that the Accused knew that the material dealt with sex.

There can be no question, it is submitted, if the obscenity statute is not to be unconstitutionally applied, that the Complaints must allege this knowledge. Without such allegations, the Complaints are fatally defective, and the convictions and the statute on which they are based are unconstitutional. See *Hamling v. United States*, 418 U.S. 87, (1974); *Miller v. California*, 413 U.S. 15 (1973).

III.

State law as written or authoritatively construed, under which obscene materials are regulated, must comply with the First Amendment standards set forth in *Miller v. California*, 413 U.S. 15. Title 14, Section 374, Code of Alabama as it was written at the time Petitioner was arrested, tried and convicted in these cases, did not comply with the standards set by *Miller*. Nor has that ordinance been "authoritatively construed" to include the *Miller* safeguards. *Miller* says that State statutes which regulate obscene material must be carefully limited. And,

> "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law, as written or authoritatively construed. A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."

And further, that,

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard-core" sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, supra.

Title 14, Section 374(3), Code of Alabama provides that:

> " 'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest."

Nowhere does this statute regulate the depicting or describing of sexual conduct as required by *Miller*, supra. Nor has this statute ever been "authoritatively construed" to regulate only that specific depiction or description of sexual conduct. For this reason, Title 14, Section 374, Code of Alabama, at the time Petitioner was arrested, tried and convicted, was unconstitutional since it failed to comply with the constitutional standards set out in *Miller v. California.*

Perhaps it can be argued that Title 14, Section 374, Code of Alabama was constitutional in light of the law at the time the Petitioner was arrested. In 1970, perhaps it was constitutional. Now, post-*Miller*, it is not. In *Visual Educators, Inc. v. Koeppell*, 268 So.2d, 22 (1972), the Alabama Supreme Court followed the decisions of this Court in incorporating the *Memoirs* requirements in the application of the State statute in order to make it valid. However, this Court has now abandoned *Memoirs v. Massachusetts*, 383 U.S. 413, (1966), and its tests, in particular the test of "utterly without redeeming social value." However, no member of this Court today supports the *Memoirs* formulation. Without the *Memoirs* test to rely on, Title 14, Section 374 is without support and therefore becomes impermissibly vague for the reasons set out above.

It is the position of Petitioner that the statute under which he has been charged is void for vagueness in that no criteria are set forth as would give fair notice of the precise standards of criminality before the commission of the alleged offense. *Watkins v. U.S.*, 354 U.S. 178, 208 (1957).

In *Miller v. California*, 413 U.S. 15, this Court promulgated a new constitutional standard for determining obscenity. Mr. Chief Justice Burger stated that:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc., vs. Dallas, supra, 390 U.S. at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. *That conduct must be specifically defined by the applicable State law as written or authoritatively construed.* A State offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value." (Emphasis supplied.)

Further, Mr. Chief Justice Burger, stated that:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials this his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S. at 491-492 (1957)."

Miller v. California, supra is the key case in which this Court defines the standards which now must be used to identify obscene material that a State or the federal government may regulate without infringing the First Amendment. It is obvious that this Court undertook to

forumulate standards more concrete than those that have ever been in the past. The sharpness of the break with *Roth* when this Court handed down *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) was not nearly so great as the break with *Memoirs* that was handed down by this Court in *Miller v. California,* supra, as far as specifically designating prohibited material is concerned. This Court was very careful to announce that statutes designed to regulate obscene materials must be carefully limited and this Court confined the permissible scope of obscenity regulation to works which depict or describe sexual conduct specifically defined by the applicable obscenity statute as written or as authoritatively construed.

Clearly, if the provisions of the State statute are limited to press mateials which depict or describe hard core sexual conduct, and if that sexual conduct is specifically defined in writing by the State, or if specific hard core sexual conduct has been read into the statute by authoritative judicial construction, the present statute under attack is not sufficient to regulate those works depicting and describing that conduct.

It should now be necessary for the Alabama Legislature to create legislation anew, adopting, if they desire, the test suggested in *Miller* so that in the future any elaborations or constructions of the *Miller* test can be left to the Courts. Before the appellate courts can so construe, there must exist a constitutionaliy permissible statute with which to work. The present Alabama statute cannot be authoritatively construed to meet the *Miller* test of specificity. Any case, criminal or civil, pending trial or appellate review, based on the present statute which clearly does not contain the *Miller* test of specificity, should be set aside. It is clear that any attempt at authoritative judicial construction by the appellate courts of Alabama incorporating the *Miller* test must fail at this juncture because the statute as written fails to give any person

fair notice that criminal liability is dependent upon a new Supreme Court suggested test that only legal researchers could appreciate at the point in time when the conduct occurred.

This Court's per curiam opinion in *Rabe v. Washington,* 405 U.S. 313 (1972) clearly indicated that the application of a statute in this manner would violate one's right to Due Process of Law. Engrafting *Miller* standards into the statute as written or as might be subsequently construed by authoritative judicial construction punishes one for conduct that was not criminal at the time it is committed. Hence, such authoritative judicial construction would violate the requirement of the Due Process clause in that a criminal statute must give fair warning of the conduct which it prohibits. There is just no doubt that the constitutional requirement of definitiveness is violated by the Alabama statute because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. No one should be held criminally responsible for conduct which he could not reasonably understand to be proscribed at the time he engaged in the conduct.

Just recently this Court reiterated that "(i)t is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined."

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if

> arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on a ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone that if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

2. The Court's failure to strike down the applicable statute as being vague will permit an unforeseeable judicial enlargement of the criminal statute before it, which will be applied retroactively, and which will operate precisely like an *ex post facto* law. All those actions done before this Court's announcement of new standards and which were done innocently under the old standards can now become criminal acts and punishable by judicial fiat. The Congress and the States are barred by the *ex post facto* clause of the Constitution from passing laws of this nature and surely the Supreme Court of Alabama and the various trial courts must be barred by the Due Process clause from achieving precisely the same results by judicial construction.

It is axiomatic that any criminal statute must give fair warning of the conduct that it makes a crime. *United States v. Harriss*, 347 U.S. 612, 617.

The Due Process clause of the *Constitution* requires that a Court strike down a criminal statute where it was not

"sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connolly v. General Construction Co.*, 269 U.S. 385, 391.

This Court has often recognized that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of Due Process of Law, and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453. See also. *Rabe v. State of Washington*, 405 U.S. 313 (1972); *Wright v. State of Georgia*, 373 U.S. 284 (1963); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

If the principles promulgated by this Court in approximately sixty-eight (68) judgments rendered on June 21 and June 25, 1973 were to be applied to Petitioner herein for alleged conduct said to be violative of the statute at a time during 1970, it would thus be violative of the Due Process clause and *Ex Post Facto* clause of Article I, Section 9 and 10, of the *United States Constitution*, because the State would be punishing Petitioner for conduct not criminal at the time he committed it, in that the said criminal statute did not give fair warning of the conduct which it prohibits, and the standards to be applied.

An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law,

and which was innocent when done, criminal; and punishes such action", or "that *aggravates* a *crime*, or makes it *greater* than it was, when committed." *Calder v. Bull*, 3 Dall. 386, 390 (emphasis supplied).

This Court has said that "no one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time." *Kring v. Missouri*, 107 U.S. 221, 235.

Until such time as the State of Alabama enacts new legislation specifically defining prohibited "hard-core" sexual conduct, or until such time as the Supreme Court of Alabama authoritatively construes the statute to specifically define hard-core sexual conduct, to thus give fair notice to future defendants, there is no constitutionally permissible statute regulating obscenity.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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